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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-682

SANTA CLARA PUEBLO, *et al.*,

Petitioners,

—v.—

JULIA MARTINEZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION

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BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION

INTEREST OF AMICUS*

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members. The ACLU is dedicated to defending civil liberties, particularly those guaranteed by the Bill of Rights.

The ACLU has a particular interest in the resolution of this case. ACLU Policy No. 313, adopted by the National Board of Directors, recognizes that "American Indian people and their tribes occupy a unique position in American society. Throughout the history of this country, Indian People have maintained cultural and religious identities distinct from those of all other peoples.' On the other hand, "the ACLU firmly supports the right of all individuals to be free from governmental abuse of power, whether the offending government be federal, state, or tribal" (Policy No. 313). That policy, and this case, require "thoughtful investigation of the countervailing interests" (id.).

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* Counsel for Petitioners and Respondents have both consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the court pursuant to Rule 42(2) of the Rules of this Court.

The ACLU is thus sensitive to the interests of Indian tribes, and also to the interests of individual tribal members. That sensitivity is reflected in this amicus brief, which we believe will be of assistance to the Court.

SUMMARY OF ARGUMENT

The legislative history of the Indian Civil Rights Act shows that Congress intended to limit tribal authority and to confer upon individual Indians substantially all of the rights contained in the United States Constitution. Those rights are enforceable in federal district courts in both civil and criminal contexts, and the Act waives tribal sovereign immunity with respect to claims made pursuant to the Act. Point I.

Although the Indian Civil Rights Act must be applied with great sensitivity to tribal customs and institutions, on the facts of this case, the tribal interests are neither sufficiently clear nor sufficiently substantial to justify the clear and substantial abridgment of respondents' constitutional and statutory rights, especially since there are less drastic means by which Petitioners can accomplish their legitimate objectives. Point II.

I. THE INDIAN CIVIL RIGHTS ACT WAIVES THE SOVEREIGN IMMUNITY OF INDIAN TRIBES AND CONFERS JURISDICTION UPON FEDERAL COURTS IN MATTERS OF TRIBAL MEMBERSHIP

The historical background, the congressional intent and the plain statutory language of the Indian Civil Rights Act of 1968, 25 U.S.C. §§1301 et seq. (ICRA), demonstrate that the Act waives the sovereign immunity of Indian tribes and confers jurisdiction upon federal courts in a broad range of disputes, including disputes about tribal membership. In fact, the central purpose of the ICRA was to place substantial restrictions on the absolute powers of tribal governments in both civil and criminal contexts.

A. Historical Background

The ICRA should be considered in historical perspective. In 1832, Chief Justice Marshall, speaking for the Court, described Indian Tribes as "distinct political communities, having territorial boundaries, within which their authority is exclusive...[and] in which the laws of [the state] can have no force." Worcester v. Georgia , 31 U.S. 515, 557, 559 (1832). Thus was born the "general notion" of "tribal sovereignty." Organized Village of Kake v. Egan, 369 U.S. 60, 72 (1962).

The Worcester formulation of inherent tribal sovereignty, under which tribal authority was deemed "exclusive" within the reservation, "has by no means

remained constant." Kake, supra at 71. Over the years, "[t]ribal sovereignty, it is apparent, has been severely limited by congressional[1] and administrative action"[2] and by the action of this Court as well.[3] The trend today "has been away from the idea of inherent Indian sovereignty...and toward reliance on federal pre-emption," McClanahan v. Arizona State Tax Comm'n, 411 U.S. 160, 172 (1973), to determine the extent of tribal authority.

The original formulation of tribal sovereignty, however, had at least one very profound effect: the provisions of the Constitution were held inapplicable

1 See e.g., the Major Crimes Act, 23 Stat. 385, as amended, 18 U.S.C. §1153 (1885); the General Allotment Act, 24 Stat. 388, as amended, 25 U.S.C. §348 (1887); 45 Stat. 1185, as amended, 25 U.S.C. §231 (1929); Pub. L. 280, 67 Stat. 588, as amended, 28 U.S.C. §1360 (1953).

2 SUMMARY REPORT OF HEARINGS AND INVESTIGATIONS BY THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE COMMITTEE ON THE JUDICIARY, "Constitutional Rights of the American Indian, " 89 Cong., 2d Sess. (1966) at 3 (hereinafter, "Summary Report").

3 See, e.g., United States v. McBratney, 104 U.S. 621 (1881); United States v. Sandoval , 231 U.S. 28 (1913); Puyallup Tribe, Inc. v. Dept. of Game of Washington, ___ U.S. ___, 97 S. Ct. 2616 (1977).

to the exercise of a tribe's powers over its members. Talton v. Mayes, 163 U.S. 376 (1896). A judicially-created doctrine of sovereign immunity exempted tribal governments from constitutional restraints, and tribal members who sought federal judicial relief from tribal abuse were consistently denied access to the courts.[4] See, e.g., Native American Church v. Navajo Tribal Council, 272 F. 2d 131 (10th Cir. 1959) (tribe not bound by First Amendment's Free Exercise of Religion Clause); Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F. 2d 529 (8th Cir. 1967) (tribe not bound by Fourteenth Amendment's Equal Protection and Due Process Clauses).

B. Legislative History

In 1961, a Senate Subcommittee began hearings to investigate the constitutional rights of American Indians.[5] Those

4 The sole exception is Colliflower v. Garland, 342 F. 2d 369 (9th Cir. 1965). In Colliflower, the Ninth Circuit imposed constitutional restraints on a tribal court which had such close affiliations with the federal government that it was deemed to be a federal instrumentality.

5 See, Hearings on Constitutional Rights of American Indians Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 1st Sess. (1961) (hereinafter "Hearings").

hearings, held intermittently through 1968,[6] revealed the extent to which the acts of tribal governments were inconsistent with constitutional principles.

Senators on the Subcommittee were "shocked"[7] and "astounded"[8] to learn

6 For further discussion of the Senate hearings and legislative history of the ICRA, see Note, "The Indian Bill of Rights and the Constitutional Status of Tribal Governments," 82 Harv. L. Rev. 1343, 1355-1360 (1969); Burnett, "An Historical Analysis of the 1968 'Indian Civil Rights' Act", 9 Harv. J. Leg. 557,574-614 (1971-72) (hereinafter, "Note" and "Burnett", respectively).

7 Testimony of Senator Hruska of Nebraska, Cong. Rec., 1st Sess., p. 35473 (Dec. 7, 1967):

"Mr. Hruska: Mr. President...As the hearings developed and as the evidence and testimony were taken, I believe all of us who were students of the law were jarred and shocked by the conditions as far as constitutional rights for members of the Indian tribes were concerned. There was found to be unchecked and unlimited authority over many facets of Indian rights. There was a failure to conform to many of the elemental and traditional constitutional safeguards. The Constitution simply was not applicable."

8 Testimony of Senator Ervin of North

(FN 8 Continued on Next Page)

that tribal powers were unchecked by constitutional restraints. Chairperson Ervin described reservation Indians as languishing "in a legal no -man's land."[9] Senator Hruska deplored the fact that tribal governments wielded "unlimited authority over many facets of Indian rights,"[10] and Congressional laxity with respect to those matters was called a "dereliction."[11]

(FN 8 Continued)
Carolina, Cong. Rec., 90th Cong., 1st Sess., p. 35473 (December 7, 1967):

"Mr. Ervin: Mr. President...When the Subcommittee on Constitutional Rights began its study of this problem most of its members were astounded to learn that under decisions of the courts, reservation Indians do not possess the same constitutional rights which are conferred upon all other Americans by the Bill of Rights and the Constitution."

9 Cong. Rec., 90th Cong., 1st Sess., p. 35472 (Dec. 7, 1967).

10 Cong. Rec., supra, n. 7.

11 Testimony of Senator Hruska of Nebraska, Cong. Rec., 90th Cong., 1st Sess., p. 35473 (Dec. 7, 1967):

"Mr. Hruska: Mr. President...In [S. 1843, the bill which was to become the ICRA] we have a very splendid document which will protect the rights of the American Indians in many ways and bring
(FN 11 Continued on Next Page)

The Subcommittee was primarily concerned with criminal trial procedures in tribal courts,[12] but that was not its sole concern. The Subcommittee's Report of 1966 specifically noted that "[i]t is not only in the operation of tribal courts that Indians enjoy something other than full benefits of the Bill of Rights."[13] The Report specifically cited the freedom of religion case of Native American Church, supra, as "instructive in pointing up the lack of remedies available to the Indian in resolving his differences with tribal officials."[14]

The Subcommittee was deeply concerned about the absence of constitutional restrictions in both civil and criminal matters. Senator Ervin's initial legislative proposal would have imposed upon tribal governments all of the limitations contained in the Constitution.[15] That

(FN 11 Continued)
those rights up to date, which will reflect great credit on this Congress and, unfortunately, will reflect greatly upon the dereliction of some of our previous Congresses. However, we should look forward rather than lament the past in this regard."

12 See Note, supra n. 6, at 1359.

13 SUMMARY REPORT, supra n. 2, at 3.

14 Id., at 4.

15 See, Note, supra n. 6, at 1359; Burnett, supra n. 6, at 588-589.

proposal was later modified to delete those few constitutional provisions which were considered antithetical to continued tribal existence, such as the Fifteenth Amendment's prohibition against discrimination in voting on account of race, and, out of deference to theocratic tribes, the First Amendment's prohibition against the establishment of religion. Other than those few deletions,[16] the bill which was to become the ICRA [S.1843 as amended] was a statutory codification of all the liberties and protections contained in the Bill of Rights and in the Fourteenth Amendment. As the Committee Report which accompanied S.1843 made clear, "the purpose of S.1843, as amended, is to insure that the American Indian is afforded the broad constitutional rights secured to other Americans."[17] There is no suggestion in that accompanying Report that those "broad constitutional rights" were to apply only in tribal criminal proceedings; indeed, the contrary is evident.

16 There were only three other deletions: the right to appointed counsel in criminal proceedings, the right to indictment by a grand jury, and the right to a jury panel in civil cases. See Note, supra, n. 6, at 1359-1360; Burnett, supra, n.6, at 589-592.

17 REPORT OF THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, Senate Report No. 841, 90th Cong., 1st Sess. (1967), at 6.

C. Statutory Language

By far the most cogent demonstration of congressional intent lies in the plain language of the ICRA itself. The language of §1302 compels the conclusion that Congress intended to confer rights in both civil and criminal contexts, and that, consequently, the habeas corpus provision in §1303 was not intended to be the exclusive remedy for violation of the Act.

Section 1302 enumerates rights which can never be redressed by habeas corpus, such as the right to be compensated for the taking of private property (§1302 (5)). Tribal interference with religious activities, which was of particular concern to the Senate Subcommittee,[18] is rarely redressable by habeas corpus. The same is true for bills of attainder (§1302 (9)), see, e.g., United States v. Lovitt, 328 U.S. 303 (1946), and for many incursions on the freedoms of speech and press (§1302 (1)). See, e.g., Healy v. James, 408 U.S. 169 (1972); Elrod v. Burns, 427 U.S. 347 (1976); City of Madison, Joint School Dis. No. 8 v. Wis. Emp. Rel. Comm'n, ___ U.S. ___, 97 S. Ct. 421 (1977).

18 See notes 13-14 supra and accompanying text. "One issue which drew Subcommittee attention to the abuse of [tribal] council power was freedom of religion." Burnett, supra n. 6, at 582. The Subcommittee received testimony,

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Quite obviously, then, Congress intended §1302 to act as a general waiver of tribal sovereign immunity with regard to the constitutional protections afforded by the Act.[19] "The Senate Committee expressed no intention to limit remedies to habeas corpus."[20] To hold that

(FN 18 Continued)

for example, that tribal members were being denied access to communal areas, and were being subjected to employment discrimination and police harassment solely because of their religious affiliations. See Hearings, supra n. 5, at 98, 467-478.

19 The fact that the IRCA does not explicitly waive sovereign immunity is irrelevant. "The underlying premise is that congressional intent will control. DeCoteau v. District County Court, 420 U.S. [425], 444, 449 [1975]." Rosebud Sioux Tribe v. Kneip, ____ U.S. ____, 51 L. Ed. 2d 660, (1977). Congressional intent is very clear. See nn. 5-17 supra and accompanying text. Since respondents sought only injunctive and declaratory relief, the issue of tribal immunity from damages is not presented here. C.f., Edelman v. Jordan, 415 U.S. 651 (1974). With respect to the relief sought, however, jurisdiction over the tribe by and through its officers is obviously proper. Ex parte Young, 209 U.S. 123 (1908).

20 Note, supra n. 6, at 1371.

habeas corpus is the exclusive remedy afforded by the ICRA would mean, for example, that a tribal government's confiscation of political handbills would be immune from challenge so long as no arrest was made. That could hardly have been the intention of Congress in affording the "broad constitutional rights" of freedom of speech and press.

Given the plain language of the Act itself, and its historical and legislative background, it is not surprising that beginning with Luxon v. Rosebud Sioux Tribe, 455 F. 2d 698 (1972), federal courts have consistently held that 28 U.S.C. §1343(4) provides a logical and specific basis of federal court jurisdiction over civil disputes arising under the ICRA.[21] "[T]o hold otherwise would render the provisions of the Act unenforceable and an exercise in Congressional futility." Johnson v. Lower Elwha Tribal Community, 484 F. 2d 200, 203 (9th Cir. 1973); Dry Creek Lodge, Inc. v. United States, 515 F. 2d 926 (10th Cir. 1975). The ICRA obviously confers federal rights, and "the existence of all necessary and appropriate remedies" to enforce those rights is presumed. Sullivan v.

21 See, e.g., Crowe v. Eastern Band of Cherokee Indians, Inc., 506 F. 2d 1231 (4th Cir. 1974); Johnson v. Lower Elwha Tribal Community, 484 F. 2d 200 (9th Cir. 1973); Dry Creek Lodge, Inc. v. United States, 515 F. 2d 926 (10th Cir. 1975).

Little Hunting Park, Inc., 396 U.S. 299, 239 (1969). It is therefore proper to imply a civil remedy under the ICRA. See, J.I. Case v. Borak, 377 U.S. 426, 433 (1964); Bell v. Hood, 327 U.S. 678, 684 (1946); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 414 n. 13 (1968).

In short, the very enactment of the ICRA, over the strenous objection of some tribal governments,[22] demonstrates the Congressional intent that all citizens of the United States should enjoy the essential protections afforded by the Constitution. And as both the Ninth[23] and Tenth[24] Circuits have now

22 See, Burnett, supra n. 6, at 589-601. "Most of the tribes testifying...were sympathetic to the purposes of the legislation and amenable to the eventual merger of the Indian and non-Indian systems of justice." The most vociferous opposition came from the Pueblos, who "resisted measures which threatened their culture or the structure of their authority." Id., at 601.

23 Laramie v. Nicholson, 487 F. 2d 315 (9th Cir. 1973), cert. den. sub nom Tonasket v. Thompson, 419 U.S. 871 (1975).

24 Martinez v. Santa Clara Pueblo, 540 F. 2d 1039 (10th Cir. 1976), cert. granted _____ U.S. _____ (1977).

held, the constitutional rights guaranteed by the ICRA are applicable to disputes concerning tribal membership.

II. USING A STANDARD OF REVIEW APPROPRIATE TO EQUAL PROTECTION CLAIMS UNDER THE ICRA, PETITIONERS' ORDINANCE MUST BE INVALIDATED

As indicated above, the ICRA confers jurisdiction upon federal courts in a broad range of issues, including issues of tribal membership. It now remains to be considered: what standard of review is appropriate in such cases, and does the appropriate standard require the invalidation of the Pueblo ordinance at issue herein?

A. Standard of Review

There would be strong reasons to apply the same equal protection standard in ICRA cases as is applied in Fourteenth Amendment cases. The wording of the two equal protection provisions is virtually identical[25], and it has always been the

25 The Fourteenth Amendment requires that a state afford equal protection of "the" laws. The ICRA requires that a tribe afford equal protection of "its" laws. Petitioners have not claimed there is any significance in this distinction, and rightly so. The word "its"

(FN 25 Continued on Next Page)

rule that where Congress borrows terms of art "in which are accumulated the legal traditions and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word," unless Congress clearly indicates otherwise. Morissette v. United States, 342 U.S. 246, 263 (1952). See also, Huddleston v. United States, 415 U.S. 814 (1974).

On the other hand, the ICRA does show congressional sensitivity to tribal interests. The conscious deletion from the ICRA of constitutional provisions that were considered completely antithetical to tribal culture and autonomy suggests that tribal culture and autonomy are legitimate factors to be considered when applying the Act's equal protection clause.

(FN 25 Continued)
should not be interpreted literally, since to do so would authorize tribal inequality in the application of federal laws and would thus transform the ICRA from a statute which protects individual liberties into one which authorizes gross discrimination. For example, if a tribe decreed that all members of a certain religious group were prohibited from voting in tribal elections, and uniformly enforced that decree, it would afford equal protection of its laws, but quite obviously would turn the ICRA on its head. C.f., Loving v. Virginia, 388 U.S. 1, 8 (1967).

The fact remains, however, that §1302 of the Act, in which Congress confers substantially all of the rights previously denied to reservation Indians, is above all else a proclamation of individual liberties. The ICRA is first and foremost a Bill for Rights for individual Indians.

The Eighth Circuit described the twin goals of the ICRA--protecting individual rights while fostering tribal self-government--as "possibly conflicting." Wounded Head v. Tribal Council of Oglalla Sioux Tribe, 507 F. 2d 1079, 1082 (8th Cir. 1975). These goals are not just "possibly" conflicting; they are inherently conflicting. The same stroke of the pen which guaranteed rights to reservation Indians necessarily diminished tribal authority to the same extent. Although some portions of the ICRA may be said to foster tribal self-government,[26] §1302 does not.

What, then, is the appropriate standard of review in equal protection claims brought under §1302 of the ICRA?

26 See, e.g. §§1321-23 of the ICRA, which eliminates the ability of a State to assume jurisdiction over an Indian reservation without the tribe's consent, and permits a State to retrocede to the federal government any jurisdiction which it had previously assumed over an Indian reservation. See also §1331 regarding employment of legal counsel and §1311-12 regarding a model code to be used in Courts of Indian Offenses.

The appropriate standard of review, amicus suggests, is one which gives deference to tribal customs and institutions, but which gives paramount concern to the individual rights afforded by the Act. Stated differently, the standard of review under the ICRA should be identical to the Fourteenth Amendment standard with one major difference: the concept of Indian sovereignty serves as a "backdrop", McClanahan, supra, 411 U.S., at 172, against which the tribal action should be viewed. This standard would permit courts to consider tribal customs or traditions, as well as the tribe's interest in autonomy and self-government, in resolving equal protection claims under the ICRA. However, "[w]here very important personal rights are at stake...even important cultural values [of the tribe] would have to give way."[27] The decision to place the fundamental rights of the individual above the interests of the government is as apparent on the face of the ICRA as it is on the face of the Constitution and the Bill of Rights; it is the cornerstone of our form of government, and Congress has now extended those rights to reservation Indians.

The standard of review amicus suggests is in accord with the clear majority of court decisions dealing with this issue. Those decisions reflect sensitivity to tribal interests while

27 Note, supra n. 6, at 1369.

safeguarding basic constitutional rights of individuals. Consistent with that sensitivity, courts have required exhaustion of tribal remedies,[28] except where such exhaustion would threaten fundamental rights.[29] Similarly, although a tribal court may not be a court of record, its decisions may nevertheless narrow a vague penal statute; yet where the statute remains impermissably vague, the overriding interests of §1302 require the statute's invalidation.[30] A tribe is free to reject certain principles of Anglo law;[31] yet where the tribe has chosen to embrace those principles, their application can be reviewed according to traditional Fourteenth Amendment standards.[32]

28 O'Neal v. Cheyenne River Sioux Tribe, 482 F. 2d 1140 (8th Cir. 1973).

29 Means v. Wilson, 522 F. 2d 833 (8th Cir. 1975) cert. den. 424 U.S. 955 (1976); Brown v. United States, 486 F. 2d 658 (8th Cir. 1973).

30 Big Eagle v. Andera, 508 F. 2d 1293

31 Wounded Head v. Tribal Council of Oglalla Sioux Tribe, 507 F. 2d 1079 (8th Cir. 1975).

32 White Eagle v. One Feather, 478 F. 2d 1311 (8th Cir. 1973).

Accordingly, lower courts have shown sensitivity to tribal interests[33], but where fundamental or overriding constitutional rights are involved have held that even important tribal interests cannot prevail.[34]

In short, the proposed standard of review seeks to accomplish what Congress intended: protect the constitutional rights of individuals while remaining sensitive, where possible, to the interests of the tribe. Where tribal interests cannot be sustained without a violation of the Act, tribal interests must give way.[35]

33 Howlett v. Salish and Kootenai Tribes, 529 F. 2d 233 (9th Cir. 1976); Daly v. United States, 483 F. 2d 700 (8th Cir. 1973).

34 Johnson v. Lower Elwha Tribal Community, 484 F. 2d 200 (9th Cir. 1973); Crowe v. Eastern Band of Cherokee Indians, Inc., 506 F. 2d 1231 (4th Cir. 1974); Means v. Wilson, supra n. 29; Martinez v. Santa Clara Pueblo, 540 F. 2d 1039 (10th Cir. 1976), cert. granted ___ U.S. ___ (1977).

35 The standard of review proposed by amicus Confederated Tribes of the Colville Indian Reservation is in accord, albeit stated differently, with the one currently suggested. On page 20 of their brief, Confederated Tribes suggest the following standard:
(FN 35 Continued on Next Page)

B. The Ordinance Violates the ICRA

Employing the suggested standard of review, the Court should declare the Pueblo's membership ordinance invalid. The ordinance results in the loss of fundamental rights, and the tribe cannot satisfy its burden of justification.

The injuries suffered by respondents as a result of the ordinance are substantial and grievous.[36] If this ordinance is sustained, respondent Audrey Martinez will be denied membership in the tribe

(FN 35 Continued)
"A classification made by an Indian tribe will be overturned only when it clearly appears that it results in deprivation of individual liberty guaranteed by the Indian Civil Rights Act." Implicit in the Colville's formulation is the recognition that individual rights guaranteed by the ICRA are paramount to the interests of the tribe. The standard proposed by Petitioners, however, would place tribal interests above individual rights in all cases, imposing on tribes only the duty of applying tribal ordinances "with an even hand." Pet's Brief, at 27. That test would be inconsistent with Congressional intent, and would render the ICRA a futile gesture. See n. 25, supra.

36 For more complete discussion of these injuries, see the district court opinion below, 402 F. Supp., at 14-15 ,
(FN 36 Continued on Next Page)

and all the benefits that depend upon membership, including the right to continue to live on the land where she has lived all of her life, the right to use tribal lands for farming, recreation or other purposes, and the right to participate in the political life of the tribe. And she will be denied those benefits through no fault of her own, and for no reason within her power to control, but solely because of her ancestry. See Hernandez v. Texas, 347 U.S. 475 (1974); Martinez v. Santa Clara Pueblo, 540 F. 2d 1039 (10th Cir. 1976), cert. granted, _____ U.S. _____, 53 L. Ed. 2d 223 (1977).

The ordinance also substantially burdens marital privacy and personal autonomy. The ordinance says to respondent Julia Martinez (and to all other Santa Clara women): if you marry a Santa Clara male, your children will be tribal members and will enjoy tribal benefits; if you marry anyone else, your children will not be tribal members and will lose those important political and economic benefits. That the ordinance

(36 FN Continued)
and that of the court of appeals, 540 F. 2d, at 1047. The injuries suffered by respondents should be considered in the context of reservation life, because the loss of membership rights, federal benefits, treaty rights, etc. do not have an equivalent in Anglo society.

does not preserve cultural purity, but does penalize extra-tribal marriage, is emphasized by the fact that the illegitimate children of a Santa Clara woman and a non-Santa Clara male will be granted full membership rights; only the legitimate offspring of such a union are penalized. (Pet.'s Brief at 32). The ordinance provides strong political and economic pressure to coerce women, but not men, to marry within the tribe, thus burdening the woman's choice of a spouse, a choice which lies at the very core of the concepts of marital privacy and personal autonomy. See Loving v. Virginia, 388 U.S. 1 (1967), Griswold v. Connecticut, 381 U.S. 479 (1965).

Finally, and most obviously, the ordinance is sexually discriminatory and applies only to female Santa Clara members; male Santa Clara members may marry anyone they choose, and their children will be tribal members.

The ordinance thus discriminates on the basis of sex and ancestry, and substantially burdens marital privacy and personal autonomy. Craig v. Boren, 429 U.S. 190 (1976); Califano v. Goldfarb, _____ U.S. _____, 51 L. Ed. 2d 270 (1977). These injuries are particularly troubling because respondent Julia Martinez is a tribal member, and therefore has a right to expect more benign treatment.37

37 The district court found that Ms. Martinez's children "are, culturally, for
(FN 37 Continued on Next Page)

As one commentator prophetically noted in 1969:

> "[Classifications] would seem a different matter when membership restrictions...are used to distinguish among those with a stake in the tribe...When a tribe has allowed a non-member on the reservation or has allowed a member to return with a "diluted" offspring, and such person has lived all or most of his life with the tribe, to allow the tribe to impose lineage distinctions is not justified by the need to preserve the tribe's ethnic base. If the statute's guarantee of equal protection is intended to have any meaning outside the criminal context, it must bar such classifications."[38]

Due to the fundamental rights at stake--tribal enrollment, sexual equality, marital privacy, personal autonomy, and freedom from discrimination because of ancestry--the tribe must meet a heavy

(FN 37 Continued)
all practical purposes, Santa Clara Indians." 402 F. Supp., at 18. Therefore, they too are within the "cultural group" entitled to protection from invidious membership classifications. See, Note, supra n. 6, at 1362-1363.

38 Note, supra n. 6, at 1362.

burden of justification. Craig v. Boren, supra; Griswold v. Connecticut, supra; Loving v. Virginia, supra.

The tribe asserts that the 1939 ordinance is a direct codification of tribal tradition. That is a dubious assertion. Even the tribe's Constitution of 1935 provides for determination of membership in cases of mixed marriage without regard to sex,[39] and the district court specifically found that the ordinance is a "break with tradition."[40] 402 F. Supp. at 16.

But even assuming the presence of a tribal tradition, individual rights guaranteed by the ICRA cannot be denied by the mere assertion of a "tribal tradition." It was precisely the harm caused by tribal traditions which prompted the

39 Const. and Bylaws of the Pueblos of Santa Clara of New Mexico, Art. II, Sec. 1 (c), appendixed to Pet.'s Brief, at 2.

40 The trial record reveals that, historically, membership in cases of mixed marriage was dealt with on a case by case basis. 402 F. Supp. at 16; 540 F. 2d at 1047.

enactment of the ICRA. Nor is it dispositive, as petitioner claims,[41] that the ordinance is "evenly applied;" denying everyone in a class the rights to which they are entitled does not validate an invidious classification. Craig v. Boren, supra; Loving v. Virginia, supra.

The tribal tradition may serve as a "backdrop;" but so, too, must the Fourteenth Amendment. We must consider whether the ordinance is substantially related to the tribe's legitimate interests and whether less restrictive means are available to protect those interests. Craig v. Boren, supra; Shapiro v. Thompson, 394 U.S. 618 (1969); Sugarman v. Dougall, 413 U.S. 634 (1973).

The irony of this case is that the tribal ordinance is not substantially related to the tribe's legitimate interests; in fact, it is antithetical to the interest advanced by the tribe. The tribe seeks to keep itself culturally pure. We will assume that is a legitimate interest. The 1939 ordinance was asserted to be the main bulwark between the Pueblo and persons "who would come in from all directions." Testimony of Gov. Tafoya, R.P. 117 (Pet.'s Brief, at 28). But the 1939 ordinance bestows automatic membership on persons who may have no ties, either to the tribe or to the reservation, other than having been

41 See Pet.'s Brief, at 25-27.

born to a male tribal member, while it excludes from membership persons with Santa Clara blood who have lived all their lives on the reservation and who are steeped in tribal culture. Cultural purity would be protected more by membership requirements of residence and blood quantum than by the ordinance at issue.

The Pueblo has an insubstantial cultural and historical interest in maintaining the 1939 ordinance. In fact, as the district court noted, the ordinance may well be destructive of the Pueblo's interests, 402 F. Supp. at 18.

The court of appeals held that the ordinance was neither logically related to the cultural survival of the Pueblo nor supported by tribal history, and characterized the ordinance as an arbitrary solution, of recent origin, to what was essentially an economic problem. 540 F. 2d at 1046-1048. The record supports those conclusions.

Even if the tribal interests were substantial, the following drastic alternatives would satisfy the tribal interests regarding the cultural purity of children of mixed marriages, without violating the equal protection clause: (a) allow all such children to be members; (b) allow none of such children to be members; (c) allow only those children who meet a certain blood quantum to be members; (d) allow only those children who meet both a blood quantum and a

residence requirement to be members; (e) allow only those children who demonstrate a certain level of cultural awareness to be members. The ultimate decisions with respect to the adoption of these alternatives must be left with the tribe. Crowe v. Eastern Band of Cherokee Indians, Inc., 506 F. 2d 1231 (4th Cir. 1974). But the availability of such alternatives undermines the claims of tribal necessity for the challenged ordinance.

In short, this case involves precisely the type of discrimination against tribal members the ICRA was designed to eliminate.[42] The tribal interest advanced to support that discrimination is recent, insubstantial, and capable of satisfaction by less drastic means. Accordingly, that ordinance violates the ICRA. "[T]o hold otherwise would render the provisions of the Act unenforceable and an exercise in Congressional futility." Crowe, supra at 1234.

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42 See Note, supra n. 6 at 1362-63; see also n. 38 supra, and accompanying text. Instances of discrimination with respect to enrollment are not limited to the instant tribe. This amicus is presently litigating the case of Pilcher v. Sac and Fox of Missouri Tribe, Civ. No. 77-4023 (D. Kan., filed Feb. 14, 1977). In that case, the uncontroverted evidence shows that a tribe accepted the enrollment applications of two brothers and simultaneously denied an identical
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CONCLUSION

For the reasons set forth herein, the decision below should be affirmed.

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application from a third brother. It is alleged in that case that the tribe's decision was based solely on ill-feelings harbored by the tribal chairman against the applicant.